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No. 83-

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

NATHAN SOLOMON,

Petitioner,

-v.-

DAVID HARRIS, Warden of Green Haven Correctional Facility and ROBERT ABRAMS, Attorney General of the State of New York,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTION PRESENTED

Whether the minimum standard of competence which must be displayed by an attorney for a criminal defendant in order to provide effective assistance of counsel under the Sixth Amendment should be the reasonable competence standard adopted by eleven Circuit Courts, the "farce and mockery" test of the Second Circuit, or some other appropriate standard of competence?

CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF CASES CITED	ii
OPINIONS BELOW	1
JURISDICTION	2
STATEMENT OF THE CASE	2
Counsel's Pretrial Conduct	3
Counsel's Trial Representation	4
REASONS FOR GRANTING THE WRIT	7
CONCLUSION	12

TABLE OF CASES

Beasley v. United States, 491 F.2d 687 (6th Cir. 1974)	10
Bellavia v. Fogg, 613 F.2d 369 (2d Cir. 1979)	9
Brinkley v. LeFevre, 621 F.2d 45 (2d Cir. 1980) cert. denied, 449 U.S. 868 (1980)	9
Bruton v. United States, 391 U.S. 123 (1968)	8
Cooper v. Fitzharris, 586 F.2d 1325, 1328-30 (9th Cir. 1978) (en banc), cert. denied, 440 U.S. 974 (1979)	10
Dyer v. Crisp, 613 F.2d 275, 278 (10th Cir. 1980) (en banc), cert. denied, 445 U.S. 945 (1980)	10
Hawkman v. Parratt, 661 F.2d 1161, 1165 (8th Cir. 1981)	10
Indiviglio v. United States, 612 F.2d 624 (2d Cir. 1979) (Mansfiled, J. concurring) cert. denied, 445 U.S. 933 (1980)	9
Marzullo v. Maryland, 561 F.2d 540 (4th Cir. 1977), cert. denied, 435 U.S. 1011 (1977)	10
Maryland v. Marzullo, 435 U.S. 1011, 1012 (1977) (White, J. dissenting)	12

TABLE OF CASES

	Page
Moore v. United States, 432 F.2d 730 (3rd Cir. 1970)	10
Nelson v. Estelle, 642 F.2d 903 (5th Cir. 1981)	10
Rickenbacker v. Warden, Auburn Correctional Facility, 550 F.2d 62 (2d Cir. 1976), cert. denied, 434 U.S. 826 (1977)	9
United States v. Aulet, 618 F.2d 182 (2d Cir. 1980)	9
United States v. Bosch, 584 F.2d 1113 (1st Cir. 1978)	10
United States v. Daniels, 558 F.2d 122 (2d Cir. 1977)	9
United States v. DeCoster, 624 F.2d 196, 202-207 (D.C. Cir. 1979) (en banc)	10
United States v. Medico, 557 F.2d 309 (2d Cir. 1977), cert. denied, 434 U.S. 986 (1977)	9
United States ex rel. Williams v. Twomey, 510 F.2d 634, 640 (7th Cir. 1975), cert. denied, 423 U.S. 876 (1975)	10

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TO THE HONORABLE, THE CHIEF JUSTICE OF THE UNITED STATES AND THE ASSOCIATE JUSTICES OF THE UNITED STATES SUPREME COURT.

Petitioner, Nathan Solomon, respectfully requests that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit which affirmed a judgment of the United States District Court for the Southern District of New York dismissing a petition for a writ of habeas corpus.

OPINIONS BELOW

The opinion of the Court of Appeals was rendered on May 13, 1983, and will not be officially reported. A copy of the opinion is annexed as Exhibit A.

The opinion of the District Court was not officially reported. A copy of the District Court opinion is annexed as Appendix B.

The New York State Supreme Court denied on the merits petitioner's coram nobis petition alleging incompetency of counsel. A copy of this decision is annexed as Exhibit C. The Supreme Court, Appellate Division denied leave to appeal.

JURISDICTION

The judgment of the Court of Appeals was entered on May 13, 1983; a copy of the judgment is annexed as Appendix A. On June 30, 1983, the Court of Appeals denied a timely application for rehearing en banc. A copy of the order denying rehearing en banc is annexed as Appendix D. No application has been filed for an extension of time in which to file this petition.

The Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

STATEMENT OF THE CASE

Petitioner was charged on August 1, 1974 in a Bronx County indictment of acting in concert with Joseph Miller on two separate counts: murder in the second degree and felonious possession of a weapon. The indictment alleged that on June 18, 1974, petitioner and Miller caused the death of Norman Duncan.

Counsel's Pretrial Conduct

On August 18, 1974, the law firm of Robert M. Gardner filed a notice of appearance pursuant to its appointment as counsel for petitioner under New York County Law §18-B. Attorney David Isaacson was the attorney who worked on petitioner's case and appeared at trial for him.

On September 24, 1975, six months before the trial began, petitioner filed a pro se motion for reassignment of counsel. In this motion, petitioner stated that Isaacson had failed to visit him, had not submitted any motions to protect his constitutional rights, had failed to conduct any fact-finding, and had not corresponded with him.

Appointed counsel finally hired a private investigator in October, 1975, one year and three months after the incident, and one month after petitioner's first pro se motion. On November 7, 1975, appellant filed another pro se application for a writ of habeas corpus for a bail reduction. Co-defendant Miller had been released on bail; petitioner was still in jail. Both of the pro se motions were denied.

Petitioner's allegations of inadequate pretrial preparation were confirmed in the "Voucher for Compensation and Expenses of Appointed Counsel" submitted by Mr. Gardner on August 17, 1976, and certified by him as true. Section 2 of the form, entitled "Time Spent in Preparation (Out of Court)" indicated that from August 19, 1974, to March 25, 1976, when the trial ended, counsel spent no hours in interviews with his client, did no legal research, interviewed no witnesses, and consulted with no prosecution officials. The first entry for out of court preparation was

for March 20, 1976 for 2 hours of "exam. of files at home" -- four days after the trial had started. The first time that assigned counsel consulted with an investigator according to this voucher was on that same date for two hours. Upon examining the expense voucher, therefore, it appears that absolutely no preparation was done before the trial started.

Counsel's Trial Representation

Petitioner was convicted along with Miller of second degree murder. The deceased and an associate of his, Isom, had both planned a robbery of their boss, Miller, because they were dissatisfied with the pay they were receiving. Miller was a drug dealer who allegedly employed petitioner as his "bodyguard," employed Duncan and Isom as lookouts, and employed George McFadden as a seller.

At about 5:30 on June 18, 1974, after considerable drinking, Duncan met Isom at 173rd Street and Southern Boulevard in the Bronx. Isom had a drink on the street with Duncan. Duncan and Isom then started to walk down Hoe Avenue from 173rd Street to 172nd Street. They passed Solomon who was sitting in his beach chair in the middle of the block. Isom was carrying a paper bag which contained a gun. After passing Solomon, Isom and Duncan reached McFadden who was sitting on the stoop of a building. (Earlier that day, Duncan had threatened McFadden saying that if he and Isom did not get what was coming to them, then McFadden was "going to get his.") Isom walked about four feet past Duncan and McFadden. Duncan then started

struggling with McPadden. At this point Solomon noticed the struggle, went down on one knee, drew a gun and fired from a distance of 35 to 50 feet. Once Solomon fired, Isom pulled a gun out of the paper bag he was carrying and fired back.

During the cross-fire between Solomon and Isom, Duncan was struck in the left chest by one bullet which proved fatal.

Isom testified that a week after the shooting, Miller talked to him about it. Miller then told Isom "My man could have killed you too."

Petitioner's defenses were (a) that the State could not prove beyond a reasonable doubt that petitioner had not reasonably believed his actions necessary to prevent the robbery of a co-worker and (b) that the State could not, in any event, prove beyond a reasonable doubt that the bullet that killed Duncan was fired by petitioner rather than by the other gunman in the incident. By its own statement, the prosecution's most important "guidepost" to the jury was co-defendant's hearsay statement that "My man could have killed you too." In summation, the prosecution stated:

> The fifth and final guidepost was Miller's words. He said, and now we get to the remark that I asked you to keep in the beginning, "My man could have killed you too." His man was Nathan Solomon. That his man could have killed Isom too. Is there any doubt in light of that remark that it was Miller's plan and that it was Miller's time and Solomon was Miller's man and acting out that plan?

Petitioner presented one defense witness: The private investigator hired by appointed counsel one year and three months after the incident. This private investigator

was put on the stand to introduce a tape recording wherein Isom allegedly stated that he had not seen petitioner fire his gun. Yet, on cross-examination, the prosecutor pointed to four places in the transcript where Isom actually stated that he had seen petitioner fire. The investigator then admitted that he had not read the transcript before testifying and that petitioner's appointed counsel had given him no instructions or guidance.

The record additionally indicates that appointed counsel did not move for separate trials; did not file any pretrial motions to discover information of the prosecution, to suppress inadmissible evidence, or to reduce petitioner's bail; and did not object to the prosecution's introduction of extensive background evidence of defendant's drug-related activities.

In 1979, petitioner commenced a coram nobis proceeding to vacate the conviction based on the inadequacy of trial counsel in violation of the Sixth and Fourteenth Amendments. The judge, who had been the trial judge and was the judge who had approved trial counsel's §18-B voucher denied petitioner's coram nobis petition on the merits. Permission to appeal to the Appellate Division was denied. A further appeal to the New York Court of Appeals is not permissible. Petitioner then filed a pro se petition for habeas corpus in the Federal District Court for the Southern District of New York alleging, among other things, that trial counsel had ineffectively represented him. The

district court denied the petition.* The United States Court of Appeals for the Second Circuit affirmed the judgment of the District Court.

The Circuit Court's opinion in this case reasoned that (1) trial counsel's infrequency of consultative visits, standing alone, did not make representation a "farce and mockery," (2) "some investigative work" done by the private investigator negated the claim of insufficient investigation and (3) the failure of trial counsel to object to the Bruton statement was not facially incompetent, because an objection may have brought it too much attention as "Solomon's status as Miller's armed bodyguard was virtually conceded, and Miller's hearsay statement merely reaffirmed his playing of that role."

REASONS FOR GRANTING THE WRIT

This case presents an important issue for the Court's consideration -- whether the appropriate standard under the Sixth Amendment for judging the adequacy of an accused's trial counsel's representation should be the "farce and mockery" standard of the Second Circuit or the reasonable competence standards adopted by all the other Federal Circuit Courts of Appeals. This Court has never

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* The district court, in its original opinion, did not consider the inadequacy of counsel issue because, apparently unaware of the coram nobis petition, it held that petitioner had not exhausted his state remedies. The district court later issued a corrective memorandum, stating that state remedies indeed had been exhausted, but went on to deny petitioner's claim on the merits. However, before this corrective memorandum was issued, petitioner already had filed his notice of appeal. There being no question of exhaustion before the Second Circuit, that Court went directly to the merits of the inadequacy of counsel issue.

directly addressed this issue and a decision from this Court is needed to resolve the disarray of standards at the Circuit level.

The instant case presents a striking example of a shockingly unprepared, confused and lackadaisical attorney who deprived petitioner of a chance at a fair trial. The record indicates that prior to this nine-day trial for second degree murder, appointed counsel spent absolutely no time in preparation. Trial counsel spent no time interviewing the client, did no legal research, had no interviews with witnesses, and charged no time in consultation with prosecution officials. Six months before the trial began, petitioner attempted to have his counsel reassigned because of the blatant failures.* Petitioner even had to file a pro se motion for reduction in bail.

Aside from the lack of preparation at trial, which ipso facto may be inadequate representation, appointed counsel additionally made numerous major errors at trial. Most egregiously, he failed to object to the introduction of co-defendant Miller's inculpatory hearsay statement, "My man could have killed you too." This statement was clearly inadmissible under the dictates of Bruton v. United States, 391 U.S. 123 (1968), and was the major vehicle through which the prosecutor cast petitioner's acts as being part of Miller's "plan". Second, the only witness that trial counsel put on the stand for petitioner, the private investigator who was hired one year and three months after the

* Only after that motion did trial counsel hire a private investigator. The difficulty of finding witnesses to a street crime 1-1/4 years after the incident is self-evident.

commission of the alleged street crime, was woefully unprepared and was directly contradicted and disgraced in cross-examination by the prosecutor. Appointed counsel made other numerous mistakes, such as failing to object to introduction of irrelevant testimony of alleged drug dealings; failing to object to the judge's erroneous jury charge; failing to ask for a separate trial in view of the Bruton statement; and cross-examining witnesses in a confused and fruitless manner.

The Second Circuit did not agree that trial counsel's representation made petitioner's trial a "farce and mockery" of justice. However, neither did it state that trial counsel's representation met the reasonable competence tests outstanding in all the other circuits. This omission is significant, because in every recent reported case in the Second Circuit where the "farce and mockery" standard (see below) was applied, the Court declined to grant the writ on the additional ground that the appellant could not even satisfy the reasonable competence test. See e.g., Brinkley v. LeFevre, 621 F.2d 45 (1980); United States v. Aulet, 618 F.2d 182 (1980); Bellavia v. Fogg, 613 F.2d 369 (1979); Indiviglio v. United States, 612 F.2d 624 (1979) (Mansfield, J. concurring); United States v. Taylor, 562 F.2d 1345 (1977); United States v. Daniels, 558 F.2d 122 (1977); United States v. Medico, 557 F.2d 309 (1977); Rickenbacker v. Warden, Auburn Correctional Facility, 550 F.2d 62 (1976). Here, there was no such finding. Indeed, Judge Oakes concurred in the decision because he felt "bound

by the present law of the Circuit," implying that the holding may have been different under the reasonable competence standard.

The case of United States v. Wight, 176 F.2d 376 (D.C. Cir. 1949), cert. denied, 338 U.S. 950 (1950), set the standard of review for inadequa -of-counsel claims in the Second Circuit. This standard, adopted by the other Federal Circuits, then abandoned by all circuits other than the Second,* demands that the trial counsel's representation be so poor as to make the trial "a farce and a mockery of justice." According to the Second Circuit, even counsel's falling asleep during trial does not meet this test. See, United States v. Katz, 425 F.2d 928, 931 (2d Cir. 1970).

The Circuit Court's opinion in this case reasoned that (1) trial counsel's infrequency of consultative visits, standing alone, did not make representation a "farce and mockery," (2) "some investigative work" done by the private investigator negated the claim of insufficient investigation and (3) the failure of trial counsel to object to the Bruton statement was not facially imcompetent, because an objection may have brought it too much attention as "Solomon's status as Miller's armed bodyguard was virtually conceded, and Miller's hearsay statement merely reaffirmed his playing of that role."

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* See, e.g., United States v. Bosch, 584 F.2d 1113 (1st Cir. 1978); Moore v. United States, 432 F.2d 730 (3rd Cir. 1970); Marzullo v. Maryland, 561 F.2d 540 (4th Cir. 1977); Nelson v. Estelle, 642 F.2d 903 (5th Cir. 1981); Beasley v. United States, 491 F.2d 687 (6th Cir. 1974); United States ex rel. Williams v. Twomey, 510 F.2d 634, 640 (7th Cir.), cert. denied, 423 U.S. 876 (1975); Hawkman v. Parratt, 661 F.2d 1161, 1165 (8th Cir. 1981); Cooper v. Fitzharris, 586 F.2d 1325, 1328-30 (9th Cir. 1978) (en banc), cert. denied, 440 U.S. 974 (1979); Dyer v. Crisp, 613 F.2d 275, 278 (10th Cir.) (en banc) cert. denied, 445 U.S. 945 (1980); United States v. DeCoster, 624 F.2d 196, 202-07 (D.C. Cir. 1979) (en banc).

Unfortunately, the Circuit opinion ignored other cited deficiencies of trial counsel, and misanalyzed the ones it mentioned.

First, petitioner argued that the failings of trial counsel taken as a whole made the trial a farce and mockery of justice, and at the least, showed a severe lack of reasonable competence. The Court's statement that lack of consultative visits standing alone does not make representation of farce and a mockery is thus inapposite. Second, the contention that not objecting to the Bruton statement was a reasonable tactical judgment completely ignores the record. Petitioner never conceded that his bullet killed Duncan, nor that he acted in concert with Miller in this particular incident. The Bruton statement was the lynchpin of the prosecution's closing statement, and was mentioned by the judge in his charge as a vital piece of evidence in the prosecution's case. Third, the Circuit Court opinion ignored the fiasco of the private investigator's testimony; the fact that trial counsel waited 1-1/4 years to hire the investigator; the fact that petitioner was not released on bail because of default of trial counsel and therefore could not have cooperated as fully in his own defense had he been released on bail as was codefendant; and the other failings mentioned above. The totality of the circumstances was thus overlooked by the Circuit Court.

The Second Circuit felt that trial counsel's omissions did not convert petitioner's trial into a farce and

a mockery of justice. However, if the record of trial counsel's efforts were analyzed under the "reasonable competence" standards, this Court would find that trial counsel's efforts fell far below that standard. The proper choice of standard would thus determine the outcome of this case. This case is therefore an appropriate vehicle for the Court to define the minimum quality of representation required to be provided to indigent defendants. See, Maryland v. Marzullo, 435 U.S. 1011, 1012 (1977) (White, J., dissenting).

CONCLUSION

For the foregoing reasons, this Court should grant the petition for certiorari.

Respectfully submitted,

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Attorneys for the Petitioner.

Of Counsel:

Daniel B. Rubock

New York, New York
September 28, 1983

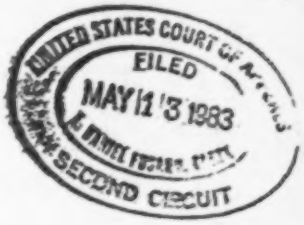
N.B. Since this statement does not constitute a formal opinion of this court and is not uniformly available to all parties, it shall not be reported, cited or otherwise used in unrelated cases before this or any other court.

ATES COURT OF APPEALS

HE SECOND CIRCUIT

81-2180

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 13th day of May , One Thousand Nine Hundred and Eighty-Three.



Present:

Honorable James L. Oakes,
Honorable Richard J. Cardamone,
Honorable Ralph K. Winter,
Circuit Judges.

Nathan Solomon,
Petitioner-Appellant,

v.

ORDER
#81-2180

David Harris, Warden of Green Haven Correctional Facility, and Robert Abrams, Attorney General of the State of New York,
Respondents-Appellees.

Nathan Solomon appeals from a final judgment of the United States District Court for the Southern District of New York, Brieant, Judge, denying his petition for a writ of habeas corpus. The petition claims that Solomon was denied effective assistance of counsel, that testimony at trial was admitted in violation of Bruton v. United States, 391 U.S. 123 (1968), and that petitioner's guilt was not proven beyond a reasonable doubt. We affirm.

Petitioner was tried in Bronx County, New York, and found guilty of murdering Norman Duncan. The evidence at trial

established that petitioner, Duncan and others were all members of a loosely knit group of narcotics peddlers. Joe Miller, the dealer, was the group's leader, Solomon was his "bodyguard," the victim Duncan and Donald Isom were both lookouts, and George McFadden was a seller. Prior to the killing on June 18, 1974, Duncan and Isom had become upset over the pay they were receiving from Miller. The pair thought Miller was in league with McFadden and therefore decided to rob either or both of them. McFadden heard of this possibility in the early afternoon of June 18. He so informed Miller who in turn armed Solomon when the three gathered on 173rd Street and Hoe Avenue later that same afternoon. Between 5:30 and 6:00 p.m., Duncan and Isom arrived and walked past Solomon toward McFadden. The latter was sitting on the stoop of a building located midway between 173rd and 172nd Street on the east side of Hoe Avenue. When Duncan and Isom reached McFadden, Duncan moved towards him while Isom continued to walk past him. A "scuffle" ensued between Duncan and McFadden and Solomon, standing fifty feet south of McFadden on the same side of Hoe, dropped to one knee and began firing.

At some point, Isom returned the fire, but the jury could have found that Isom's fire occurred after Solomon's and was in any event directed toward Solomon, not toward Duncan and Isom. The jury could thus easily have found that Duncan was hit by a bullet fired by Solomon. Other relevant evidence was a statement by Isom that Solomon's co-defendant Miller said to him

a week later, "My man could have got you too." The statement was not objected to by Solomon's counsel.

On March 25, 1976, Solomon was found guilty of acting in concert with Miller to cause second degree murder. On appeal to the Appellate Division, he raised for the first time the claim that Miller's statement was inadmissible under Bruton, supra, and requested that the court order a new trial under its interest of justice jurisdiction. Though other objections were raised as well, the Appellate Division on February 2, 1978, affirmed his conviction without opinion. On April 18, 1979, Solomon began a state coram nobis proceeding in which he claimed that his Sixth and Fourteenth Amendment rights had been violated due to ineffective assistance of counsel. Included in this claim were assertions that trial counsel had not adequately investigated or prepared the case and did not adequately conduct the trial. The failure to object to the purported Bruton violation was cited in support of the latter assertion. On May 15, 1979, that petition was also denied.

Having exhausted his state remedies, Solomon petitioned for a writ of habeas corpus in the federal district court. Six claims were raised, three of which were later waived. The remaining live claims relate to the issues of effective assistance of counsel, the alleged violation of Bruton and the sufficiency of the evidence establishing petitioner's guilt. Judge Brieant rejected the first and the last claims and held that

any error incident to the putative Bruton violation was harmless beyond a reasonable doubt.

The standard against which a claim of ineffective counsel is measured in this Circuit is a stringent one. "Unless the purported representation by counsel was such as to make the trial a farce and a mockery of justice," the Sixth Amendment right to effective counsel is not infringed. See United States v. Wright, 176 F.2d 376, 379 (2d Cir. 1949), cert. denied, 338 U.S. 950 (1950); United States v. Helgesen, 669 F.2d 69 (2d Cir. 1981); United States v. Audet, 618 F.2d 47 (2d Cir. 1980). To determine whether counsel's representation constitutes such an abuse, the strengths of the government's case must be balanced against an assessment of the harm, if any, done by the cited examples of ineffectiveness. Here that balance weighs in the state's favor. The evidence at trial was plainly sufficient to support a verdict of guilt beyond a reasonable doubt. Petitioner's claim of ill-preparedness is tied largely to the alleged infrequency of consultative visits by counsel, the purported failure to interview witnesses, and the failure to raise the Bruton objection. The first, however, has been specifically held not to render representation a farce and a mockery, at least when it stands alone. Brinkley v. LeFevre, 621 F.2d 45, 46 (2d Cir. 1980). As to the purported failure to interview witnesses, some investigative work was done by a court-appointed private investigator and we regard the claim that further investigation would have benefited Solomon as

entirely speculative. As to the Bruton argument, Solomon never objected at trial or at the time of the court's instructions to the alleged violation of Bruton. The Appellate Division, presented with a request to invoke its interest of justice jurisdiction and with arguments by the state asserting both a procedural bar to the Bruton claim and a meritorious defense, simply affirmed without opinion. As a result, adequate independent state grounds existed for the affirmance of Solomon's conviction, namely, that an objection was never raised below as required by the contemporaneous objection rule.

We must assume that the Appellate Division's decision rests on that state procedural default. Martinez v. Harris, 675 F.2d 51, 54 (2d Cir. 1982). So framed, the issue now is whether the default was waived under the "cause and prejudice" test. Wainwright v. Sykes, 433 U.S. 72 (1972). Solomon argues that "cause" is present in the ineffective assistance he received from his counsel and that, for Wainwright purposes, "cause" is a lack of reasonable competence. However, we need not determine what level of lack of competence is applicable, since the decision not to object was not facially incompetent. Counsel may have been well-advised simply to allow the statement in without drawing undue attention to it. Solomon's status as Miller's armed bodyguard was virtually conceded, and Miller's hearsay statement merely reaffirmed his playing of that role. That the prosecutor subsequently relied upon the statement in a not particularly

logical argument does not affect the conclusion that at the time of admission, a failure to object was a reasonable tactical judgment.

Affirmed.

Judge Oakes concurs in the foregoing judgment as bound by the present law of the Circuit, nevertheless reserving the right to request a vote on rehearing en banc in the event a petition therefor is filed.

James L. Oakes
Honorable James L. Oakes

Richard J. Cardamone
Honorable Richard J. Cardamone

Ralph K. Winter
Honorable Ralph K. Winter

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- -X

NATHAN SOLOMON,

Petitioner,

-against-

DAVID HARRIS, Warden of Green Haven Correctional Facility and ROBERT ABRAMS, Attorney General of the State of New York,

Respondents.

- -X

Pro Se 80 Civ. 4321-CLB

MEMORANDUM AND ORDER

Brieant, J.

Petitioner, Nathan Solomon, a New York State prisoner, seeks a writ of habeas corpus pursuant to 28 U.S.C. § 2254. He claims that his rights under the Fifth, Sixth and Fourteenth Amendments to the United States Constitution were violated in the course of his state court conviction of murder in the second degree.

Respondents have filed an affidavit and a memorandum in opposition to the petition, and have provided the Court with the transcripts of petitioner's trial and sentencing in state court, as well as the briefs submitted by the parties in the petitioner's state appeal. For the reasons set forth below, the petition and application are denied.

Petitioner was charged in an indictment by a Bronx County Grand Jury on August 6, 1974 with the felonies of murder in the second degree and

possession of a weapon. On June 16, 1976, after a joint trial with Joseph Miller before a jury, petitioner was convicted of murder in the second degree. N. Y. Penal Law § 125.25(1). He was sentenced to an indeterminate term of twenty-five years to life imprisonment. His conviction was affirmed without opinion on December 15, 1977, People v. Solomon, 60 A.D.2d 798 (1st Dept. 1977), and leave to appeal to the Court of Appeals was denied on February 2, 1978.

As adduced from the trial transcript, the relevant facts concerning the incident resulting in petitioner's conviction are as follows. The petitioner, Solomon, the victim Duncan, as well as Isom, Hayes, Lucas and McFadden, were all employed by co-defendant Miller, a major narcotics dealer, in connection with a conspiracy to distribute drugs. Approximately four or five months before the fatal shooting, Duncan and Isom conceived a plan to rob Miller or one of his fellow criminals. About a week before the shooting involved in the instant case, Miller let Isom know that he was aware of this plan to rob him. Nevertheless, Miller continued to pay Isom when Isom requested him to do so. About a week before the murder, Miller began to pay Isom and Duncan less than before for services rendered in his drug operations. On the day of the shooting, Duncan complained to McFadden about inadequate pay. Duncan threatened McFadden, saying that if he and Isom did not receive a fair share, McFadden "was going to get his." Hayes testified that Duncan told him earlier on the day of the shooting that he was going to rob McFadden because he was not getting paid. Duncan telephoned Isom on the day of the shooting and requested his assistance, although, according to Isom, Duncan did not reveal his reasons for the request.

Approximately forty-five minutes before the shooting Miller handed petitioner Solomon a gun. When Duncan and Isom arrived on the scene, a point in the street at Hoe Avenue near 173rd Street, they immediately walked past petitioner Solomon, who was sitting in a chair on the sidewalk. They walked toward McFadden. Duncan then began to wrestle with McFadden; petitioner immediately dropped to one knee and began firing at Duncan at a point blank range of about fifty feet. It was June 18, 1974, between 6:00 and 6:30 P.M., daylight hours. Isom returned the fire. During the shooting, co-defendant Miller shouted encouragement to Solomon to continue firing.

Isom testified on direct examination by the People that approximately one week later, Miller told Isom: "My man could have killed you too," and that Miller identified his "man" as petitioner.

In his petition for habeas corpus, petitioner challenges the sufficiency of the evidence supporting his conviction, portions of the trial court's jury charge, the admission into evidence of testimony regarding petitioner's drug-related activities, the admission into evidence of co-defendant Miller's hearsay statement, which petitioner asserts inculpated him in the murder, the sentence by the trial court, and the adequacy of representation of his counsel at trial.

Petitioner has exhausted his state remedies as to all issues raised here which were presented to the Supreme Court of the State of New York, Appellate Division, First Department, which affirmed his judgment of conviction. See, Picard v. Connor, 404 U.S. 270, 275-76 (1971); Twitty v.

Smith, 614 F.2d 325, 332 (2d Cir. 1979). Since petitioner did not raise his Sixth Amendment claim of inadequacy of representation of counsel in his brief on appeal, there is no exhaustion as to this claim. The contentions are discussed separately below.

Sufficiency of the Evidence

Petitioner claims that the prosecution failed to prove beyond a reasonable doubt that his actions were not legally justified, and that petitioner caused the victim's death.

A federal court will grant a writ of habeas corpus to a state prisoner challenging his conviction on the ground of insufficient evidence only if the Court finds that, based on the evidence adduced at trial, no rational trier of fact could have found guilt beyond a reasonable doubt. Jackson v. Virginia, 443 U.S. 307, 319 (1979).

A review of the record in this case in the light most favorable to the prosecution demonstrates that a rational factfinder readily could have found the petitioner guilty beyond a reasonable doubt of murder in the second degree under New York law.

Justification

The People were required to disprove justification beyond a reasonable doubt. N. Y. Penal Law § 35.15(1) provides:

> "A person may, subject to the provisions of subdivision two, use physical force upon another person when and to the extent he reasonably believes such to be necessary to defend himself or a third person from what he reasonably believes to be the use or imminent use of unlawful physical force by such other person."

In addition, § 35.15(2)(a) and (b) state that a person may not use deadly physical force upon another person under circumstances specified in subdivision one unless he reasonably believes that such other person is using or about to use deadly physical force, or is committing or attempting to commit a kidnapping, forcible rape, forcible sodomy or robbery.

At trial, eyewitness Isom testified that Duncan grabbed McFadden. Eyewitness Hayes testified that Duncan started struggling with McFadden, and that as soon as the struggle started, Solomon jumped out of his chair, and, crouching on one knee, started firing the gun at Duncan. Hayes also testified on cross-examination that no punches were thrown; he characterized the incident between McFadden and Duncan as a "minor struggle." The proof showed that petitioner continued to shoot at Duncan after Duncan had run away from McFadden, while Miller was yelling at petitioner, telling him to continue shooting. From this evidence, a juror could reasonably conclude beyond a reasonable doubt that when petitioner opened fire on Duncan, petitioner did not reasonably believe that Duncan was using or about to use deadly physical force and did not reasonably believe Duncan was attempting to rob McFadden.

Causation

At the trial, three eyewitnesses testified on the People's direct case that petitioner shot at the victim Duncan. Testimony was also given that as soon as Duncan started struggling with McFadden, Solomon immediately assumed a firing position and aimed at Duncan, with Isom returning Solomon's fire.

The evidence at trial, while contradictory, viewed as it must be, most favorably to the prosecution, showed that Duncan was already staggering by the time Isom returned petitioner's fire. It is significant that Solomon aimed at Duncan and that Isom aimed at Solomon, not Duncan. There is no evidence that more than two people, petitioner and Isom, were firing guns.

From this evidence a rational trier of fact could have found beyond a reasonable doubt that petitioner caused Duncan's death, without any necessity to rely on the testimony of the medical examiner.[1/] Nor is there any question of constitutional magnitude arising out of the failure of the trial court and the lawyers to preserve a complete stenographic record of the testimony given at trial with the aid of a map or diagram of the scene of the crime. Upon his first use of the diagram, the prosecutor proposed to have the witnesses use markers to draw on the diagram. However, the trial court directed no markers be used. Hayes, Lucas and Isom each described the positions of the parties when the shooting began and throughout the incident, by reference to the diagram. Hayes testified that Duncan ran across to "this" side of the street, that Isom moved "right there," that Isom "ran up this street" and that Duncan "ran up here." Similarly, on Isom's direct examination, he referred to the diagram, and testified that Duncan "took out over here" and Solomon "went and got across the street over here." See also the testimony of Lucas. This careless use of the diagram was merely illustrative, for the benefit of the jury, and was not essential to the determination of petitioner's guilt. Therefore, the vague references to the diagram on the part of the witnesses does not constitute reversible

error. United States v. Conlin, 551 F.2d 534 (2d Cir. 1977). If indeed any error was committed, this Court concludes that from a study of the entire record of this case, it did not deprive petitioner of a fair trail. The proof of petitioner's guilt was overwhelming, see infra.

Jury Charge

Petitioner also claims that the trial court failed to charge the jury correctly and consistently respecting the State's burden of proof, petitioner's "defense" of justification, and the evidentiary weight to be accorded the indictment.

State's Burden of Proof in a Criminal Case

On the issue of the "reasonable doubt" standard, petitioner contests the court's charge that proof beyond a reasonable doubt "is the same as saying proof to a moral certainty" and contends that these words diluted the reasonable doubt standard. Standing together with the use of the words reasonable doubt, words which "almost define themselves," this expression, to which no exception was taken, is hardly error of constitutional magnitude. The argument is a mere quibble. Petitioner cites People v. Forest, 50 A.D.2d 262, 377 N.Y.S.2d 492, 495 (1st Dept. 1975), wherein the court stated: "The People are bound to prove the guilt of the defendant beyond a reasonable doubt, and a charge as here that the standard of proof is to a 'reasonable certainty' or 'reasonable and moral certainty' permits a lesser standard and constituted error." However, in that case the term "moral certainty" was referred to not alone, but in conjunction with the term "reasonable certainty,"

and so phrased it probably does dilute the reasonable doubt standard. But the phrase "to a moral certainty," standing alone as a matter of plain English represents a standard even higher than the "beyond a reasonable doubt" standard.

Petitioner also complains that the court also charged: "On the other hand, if your minds are wavering, or the scales are even, or if you have such a reasonable doubt arising out of the credible evidence, or lack of it, as to any element of the particular crime submitted to you, the benefit of that doubt must be given to the defendant, and your verdict must be not guilty." The petitioner asserts that this charge decreased the State's burden, and in effect reduced the "beyond a reasonable doubt" standard to a "preponderance of the evidence" standard. However, the unfortunate phrase "scales are even" should not be taken out of context; when the charge is viewed as a whole, it is evident that the jury was instructed correctly as to the burden of proof. The phrase "the scales are even," was apparently intended to impress upon the jurors the fact that they should resolve any conflict in favor of the defendant. The court also charged:

> "Each defendant is entitled to every inference in his favor which can reasonably be drawn from the evidence. And where two inferences may be drawn from the evidence, one consistent with guilt and one consistent with innocence, each defendant is entitled to the inference of innocence."

The court further charged:

> "Under our system of justice a defendant in a criminal action is presumed to be innocent until the contrary is proved during your deliberations in the jury room. This presumption of innocence stays with him throughout the trial and is

> destroyed, if at all, only when you during your deliberations conclude that, beyond a reasonable doubt, he is guilty of the crime submitted to you for your consideration. In this case, as in every criminal case in our State, the People acting through the District Attorney have the burden of overcoming and destroying that presumption of innocence. The defendants do not have to prove anything: in other words, they do not have to prove their innocence. The burden of proof never shifts. It is always on the People. They must sustain and prove the charges they have made. It means that the prosecutor must prove every material allegation in the indictment and every element essential to a defendant's guilt of a crime charged beyond a reasonable doubt. If there is a reasonable doubt as to the guilt of any defendant, he is entitled to an acquittal."

The court also stated that reasonable doubt

> "is not proof that the defendant is guilty by a mere preponderance of the weight of the credible evidence, as some of you who have sat in civil trials understand the rule to be in such cases. Proof of guilt by a mere preponderance of the credible evidence is not sufficient to prove the defendants' guilt in this or any other criminal case."

After having used the term "scales are even," the court instructed the jury:

> "If from the evidence there be reasonable doubt whether any defendant did any such act, he must receive the benefit of that doubt ... [and] if the necessary facts are not proved beyond a reasonable doubt, we may then have death without criminal liability, or a killing without a crime."

Still later, the court repeated the "beyond a reasonable doubt" standard.

The charge taken as a whole was fair, and did not violate petitioner's constitutional rights.

Justification

Petitioner claims now, although he failed to object to the charge at trial, that the trial court's charge regarding justification improperly shifted to petitioner the burden of proving that his actions were justified. Solomon was entitled to a charge that the People had the burden of disproving justification beyond a reasonable doubt. People v. Soto, 38 A.D.2d 734, 329 N.Y.S.2d 446, 447 (2d Dept. 1972); New York Penal Law § 25.00(1).

The trial judge instructed the jury: "Under the laws of New York, a person may use physical force upon another person when and to the extent he reasonably believes such force is necessary to defend himself or a third person from what he reasonably believes to be the use or imminent use of unlawful physical force by such other person when the actor reasonably believes that the other person is committing or attempting to commit a robbery." This is an almost verbatim recital of New York Penal Law § 35.15(1) and (2)(b). The court charged further: "Even if defendant Solomon was mistaken in his conclusion that Duncan and Isom were about to assault McFadden, as long as he reasonably believes that such assault is about to take place he is justified in using physical force to repel such an assault." This he reiterated later: "[I]t need not be proved that such deadly physical force was actually used or about to be used."

These instructions do not shift the burden of proof to petitioner to prove justification, as petitioner claims, but instead merely apply § 35.15 to the facts of this case. The mere fact that the instruction was

phrased in the positive, or with reference to Solomon, i.e., "as long as he reasonable believes," rather than in the negative, or with reference to the People, does not shift the burden to defendant. The trial court charged: "If you conclude on the basis of the evidence that the People have established to your satisfaction beyond a reasonable doubt that defendant Solomon was not justified in shooting Norman Duncan, then your verdict as to the defendant Solomon under the first count will be guilty of the crime of murder."

The court charged:

> "On the basis of what you find the facts to be, it is for you the jury to determine whether, one, Duncan or Isom or both of them acting in concert had used or were threatening the use of physical or deadly physical force upon McFadden, two, if they or anyone of them had not used deadly physical force whether Solomon from his vantage point and what he observed or could have observed reasonably believed that Isom or Duncan were about to use deadly physical force, three, that the use or imminent use of such force was reasonably believed by Solomon to be in the course of a robbery ...."

Petitioner argues that these instructions convey that in order to conclude that Solomon was justified in killing Duncan, a juror must determine that Solomon reasonably believed that deadly physical force was being used by Duncan on McFadden in the course of a robbery. This is not a correct statement of the law in New York. N.Y. Penal Law § 35.15(2). Deadly physical force may be used upon another when one reasonably believes that such other person is using or about to use deadly physical force, or is committing or attempting to commit a robbery. Therefore, if Solomon reasonably believed that Duncan was committing or attempting to commit a robbery on McFadden,

using any unlawful physical force, even if deadly physical force was not being used by Duncan, he would be justified in using deadly physical force in defense of McFadden.

However, this apparent defect in the charge was cured later on when the court charged:

> "Separate and apart from the defense of justification based on imminent assault on a third person using deadly physical force is the defense of justification based upon the reasonable belief that a robbery in which unlawful physical force is used has been or is about to be committed. If you find that the defendant Solomon reasonably believed he was witnessing a robbery being committed upon the person of McFadden by Isom and Duncan and that one or both of the latter were using any physical force against McFadden in the course ofthis robbery, then Solomon would be justified in using deadly physical force if he reasonably believed it to be necessary to defend McFadden."

The court's failure to specifically define robbery was not fatal either, since in explaining what constitutes justification, the elements of the crime of robbery were discussed, and the real issue in the case was whether the petitioner had a reasonable belief, and not whether a robbery was actually being committed under the Penal Law.

Evidentiary Value ofthe Indictment

Petitioner contends that the trial court's characterization of the indictment as "the best evidence of the charge against each defendant" was prejudicial. It is well-settled that an indictment is nothing but a formal charge on which the accused is brought to trial. An indictment is not

evidence that the offense charged was committed, and it may not be considered as evidence by the jury during deliberations. United States v. Ciambrone, 601 F.2d 616, 622 (2d Cir. 1979). Earlier in the charge, the court stated as much: "An indictment is no evidence of guilt, and you should not construe it as such. It is an accusation in writing presented by a Grand Jury to a competent court charging a person with a crime. An indictment is not part of the evidence and, therefore, is not permitted to be taken into the jury room."

Absent a showing of gross error or a fundamentally unfair trial, habeas corpus will not lie to set aside a state court conviction on the basis of jury instructions which are merely muddled or inconsistent. Petitioner must establish that the charge as a whole so failed to submit the issues to the jury as to constitute a denial of due process. Cupp v. Naughten, 414 U.S. 141, 146 (1973); United States ex rel. Smith v. Montanye, 505 F.2d 1355, 1359 (2d Cir. 1974), cert. denied 423 U.S. 856 (1975); United States ex rel. Winfield v. Cascles, 403 F.Supp. 956, 958-59 (E.D.N.Y. 1975). The trial record in the instant case disclosed that the charge given at trial was fair in its totality and comprehensive. The claimed errors were not of substance and were neither singly nor in totality of such an egregious nature that the accused was deprived of a fair trial. As noted, on many occasions, by failing to take an exception, defendants deprived the trial judge of the opportunity to clarify or correct the points now relied on.

Admission of Evidence Concerning Petitioner's Drug Dealing Activities

Petitioner next claims he was deprived of a fair trial because

the prosecution adduced background evidence that he and his victim were members of a drug conspiracy.

When a person is charged with one crime, evidence that he committed other crimes is of course inadmissible if such evidence is offered solely to establish a criminal predisposition. United States v. Brettholz, 485 F.2d 483, 487 (2d Cir. 1973), cert. denied sub nom. Santiago v. United States, 415 U.S. 976 (1974). Evidence may be admitted, however, where relevant to an actual issue in the case, with respect to motive, opportunity, intent, preparation, plan, knowledge or absence of mistake or accident, provided that its probative value outweighs its potential unfair prejudice to the defendant. United States v. DeFillipo, 590 F.2d 1228, 1240 (2d Cir.), cert. denied 442 U.S. 920 (1979).

In the instant case, the evidence relating to Solomon's involvement in the heroin trade revealed that Solomon had a motive for shooting Duncan, aside from mere protection of McFadden. The evidence revealed that Solomon and Miller were aware of Duncan's dissatisfaction with his compensation received from Miller for working as a member of the narcotics conspiracy, and that by shooting Duncan at the behest of Miller, Solomon was putting an end to any disruption of the conspiracy by Duncan or Isom. Therefore, the background information relating to Solomon's involvement in the drug dealings of Miller had probative value tending to show motive and to disprove justification, which outweighed any possible prejudice to Solomon.

Admission into Evidence of Co-defendant Miller's Hearsay Statement

Petitioner asserts that the admission into evidence through Isom

of Miller's statement to Isom one week after the murder violated his rights under the Confrontation Clause. This statement was introduced into evidence apparently as an admission by Miller, during Isom's direct examination. Isom testified that Miller told him that Miller could not believe that Isom and Duncan had planned a rebellion against him, and that his "man" could have killed Isom too; Miller explained to Isom that his "man" was Solomon. Co-defendant Miller did not take the stand in the joint trial. During summation, the prosecutor alluded to the hearsay statement on two occasions, and the court in its charge made reference to the statement. Petitioner did not object during trial to the admission of the statement, nor to the references to the statement by the prosecutor and the court; petitioner also did not request a mistrial. In view of this Court's disposition of this issue, however, it is unnecessary to consider the effect of this failure to object.

The right of a defendant to cross-examine the witnesses against him is guaranteed by the Confrontation Clause of the Sixth Amendment to the Constitution. When two or more defendants are tried in a joint proceeding, as was the case here, an extra-judicial statement of one which inculpates another may not be admitted in evidence when the maker of the statement does not testify at the trial. Bruton v. United States, 391 U.S. 123, 126 (1968).

In the instant case, it is questionable whether Miller's hearsay statement to Isom was admissible at all, even as against Miller, because the statement appears to exculpate, rather than inculpate, Miller. Therefore, the statement would not be an admission, but rather classic hearsay. Assuming

for the argument that the statement was an admission, it does appear to incriminate petitioner in the murder. Miller's statement arguably tended to inculpate petitioner by implying that petitioner shot Duncan, and perhaps that petitioner intended to kill him. In view of the overwhelming evidence of petitioner's guilt, however, this Court holds that any error committed by the introduction of the hearsay into evidence was harmless beyond a reasonable doubt. Chapman v. California, 386 U.S. 18 (1967); Fahy v. Connecticut, 375 U.S. 85 (1963); United States ex rel. Ross v. LaVallee, 448 F.2d 552 (2d Cir. 1971).

There was ample other evidence adduced at trial, set out more fully supra, that petitioner was at the scene of the crime, fired a gun at the victim, and had a motive for so firing. There was also other competent evidence that he was Miller's "man."[2/]

Excessiveness of the Minimum Sentence Imposed on Petitioner

Petitioner urges that, in the alternative, the minimum sentence imposed on him is unconstitutional and should be reduced.

Where, as in this case, the sentence imposed on the defendant is within the maximum limitation of the applicable statute, no constitutional issue as to severity of sentence is presented for the federal habeas corpus court. Williams v. Smith, 454 F.Supp. 692, 697 (W.D.N.Y. 1978), aff'd. 591 F.2d 169 (2d Cir.), cert. denied 442 U.S. 920 (1979). Since the twenty-five year minimum sentence which petitioner received is authorized by New York Penal Law § 70.00(3)(a)(1) for A-1 felonies, petitioner's claim does

rise to constitutional dimensions.

Claimed Inadequacy of Trial Counsel

As there has been no exhaustion of state remedies on this point, the Court need not reach the merits of the claim. We feel constrained to observe that this case arose out of a slaying by gunfire of one member of a drug conspiracy by another on a city street in broad daylight in the presence of at least three eye-witnesses. Clarence Darrow reincarnate could not have exonerated this petitioner of his overwhelming guilt.

For the foregoing reasons, the petition for a writ of habeas corpus is denied. The Clerk of the court shall enter final judgment.

So Ordered.

Dated: New York, New York
May 6, 1981

Charles L. Brieant

Charles L. Brieant
U. S. D. J.

FOOTNOTES

1. The medical examiner, Dr. Faruk Presswella, testified that Duncan was shot in the left side of the chest, and that the bullet travelled on a slightly downward path through his body. Petitioner argues that since the bullet's course was downward, petitioner, who fired while on one knee, could not have been the successful gunman. Dr. Presswella testified, however, that he could not speculate as to the possible position of the gunman who shot Duncan, because the "human body is a mobile target." Somebody shot Duncan. Nothing in the trial record suggests it was Isom, or a man from Mars.

2. Co-defendant Miller attacked his own conviction in this Court asserting most of the same grounds advanced here. His petition for a writ was denied on December 31, 1979 by Judge Pierce of this Court in Miller v. Czarnetzky, 79 Civ. 1058-LWP. A certificate of probable cause to appeal was denied in Miller's case.

M

SPECIAL AND TRIAL TERM PART 212

THE PEOPLE OF THE STATE OF NEW YORK

against

Nathan Solomon

Defendant

File Number 1981 19 I

Motion for: CPL 440

Submitted 5-10 1979

Argued 19

Present: DONALD ZIMMERMAN

HON. J.S.C.

Papers Numbered

Notice of Motion and Affidavit Annexed	1
Order to Show Cause and Affidavits Annexed	
Answering Affidavits	2-3
Replying Affidavits	
Exhibits	A
Stenographer's Minutes	

MURRAY KOENIG

Re: Assigned to Justice Zimmerman

Upon the foregoing papers this motion is denied. Defendant's attack on his trial counsel is devoid of merit. Defendant's guilt was overwhelmingly established at the trial and his claims "deficiencies" of trial counsel contributed in any way to the verdict of guilty.

5/15/79

Donald Zimmerman
J.S.C.

C

S COURT
JUN 3 0 1983
SECOND CIRCUIT

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

At a stated term of the United States Court of Appeals in and for the Second Circuit, held at the United States Courthouse, in the City of New York, on the thirtieth day of June, one thousand nine hundred and eighty-three.

----------X

NATHAN SOLOMON,

Petitioner-Appellant,

v.

81-2180

DAVID HARRIS, Warden of Green Haven Correctional Facility and ROBERT ABRAMS, Attorney General of the State of New York,

No. 81-2180

Respondents-Appellees.

----------X

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by counsel for the petitioner-appellant, Nathan Solomon,

Upon consideration by the panel that heard the appeal, it is

Ordered that said petition for rehearing is DENIED.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges of the court in regular active service and to any to any other judge on the panel that heard the appeal and that no such judge has requested that a vote be taken thereon.

A. Daniel Fusaro, Clerk

by Francis X. Gindhart
Chief Deputy Clerk

D

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SUPREME COURT, U.S.

No. 83-5500

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

NATHAN SOLOMON,

Petitioner,

-v.-

DAVID HARRIS, Warden of Green Haven Correctional Facility and ROBERT ABRAMS, Attorney General of the State of New York,

Respondents.

APPLICATION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

TO THE HONORABLE, THE CHIEF JUSTICE OF THE UNITED STATES AND THE ASSOCIATE JUSTICES OF THE UNITED STATES SUPREME COURT.

Petitioner, Nathan Solomon, respectfully seeks leave to proceed here in forma pauperis, without payment of fees and costs.

Counsel certifies that, in proceedings in the court below, petitioner was represented by counsel associated with The Legal Aid Society, Federal Defender Services Unit, appointed pursuant to the Criminal Justice Act.

New York, New York
September 27, 1983

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ALEXANDER L. STEVAS,
CLERK

NO. 83-5500

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

NATHAN SOLOMON,

Petitioner,

-against-

DAVID HARRIS, Warden of Green Haven
Correctional Facility,

Respondent.

ON PETITION FOR A WRIT OF
CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

RESONDENT'S BRIEF IN OPPOSITION

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Of Counsel

NO. 83-5500

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

NATHAN SOLOMON,

Petitioner,

-against-

DAVID HARRIS, Warden of Green Haven Correctional Facility,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

Respondent submits this brief in opposition to the petition for a writ of certiorari to the United States Court of Appeals for the Second Circuit filed by petitioner's appointed counsel. Respondent respectfully requests that the court deny the petition for a writ of certiorari.

QUESTIONS PRESENTED

1. Whether a case in which both a New York State court and the federal district court found that petitioner was afforded the effective assistance of counsel under the 6th and 14th Amendments using the more exacting "meaningful representation" and "reasonable competence" standards, presents the appropriate vehicle for issuing a writ of certiorari to review the constitutional propriety of the Second Circuit's "farce and mockery" standard for examining the effective assistance of defense counsel in a state criminal trial?

2. Whether a writ of certiorari should issue to review the Second Circuits "farce and mockery" standard where, given the facts of the instant case, petitioner received the effective assistance of counsel under any of the prevailing standards adopted by the Circuit Courts.

THE PARTIES

All parties are named in the caption of the petition.

TABLE OF CONTENTS

	PAGE
QUESTIONS PRESENTED	1
THE PARTIES	2
STATEMENT OF THE CASE	3
The State Court Appeals	4
The Collateral State Proceedings	5
The Federal Court Proceedings	5
REASONS FOR DENYING THE WRIT	7
POINT	
A WRIT OF CERTIORARI SHOULD NOT ISSUE TO REVIEW THE CONSTITUTIONAL PROPRIETY OF THE SECOND CIRCUIT'S "FARCE AND MOCKERY" STANDARD FOR DETERMINING THE EFFECTIVE ASSISTANCE OF COUNSEL UNDER THE 6TH AND 14TH AMENDMENTS IN THE INSTANT CASE SINCE BOTH A NEW YORK STATE COURT AND THE FEDERAL DISTRICT COURT FOUND THAT PETITIONER WAS AFFORDED THE EFFECTIVE ASSISTANCE OF COUNSEL USING MORE EXACTING STANDARDS AND WHERE, GIVEN THE FACTS OF THE INSTANT CASE, PETITIONER RECEIVED THE EFFECTIVE ASSISTANCE OF COUNSEL UNDER ANY OF THE PREVAILING STANDARDS ADOPTED BY THE CIRCUIT COURTS	7
CONCLUSION	10

TABLE OF AUTHORITIES

Table of Cases

Brinkley v. LeFevre, 621 F.2d 45 (2d Cir. 1980)	8
Bruton v. United States, 391 U.S. 123 (1968)	6
People v. Aiken, 45 N.Y.2d 394 (1978)	8
People v. Baldi, 54 N.Y.2d 137 (1981)	8
People v. Bell, 48 N.Y.2d 933 (1981)	8
People v. Solomon, 43 N.Y.2d 932 (1978)	4
People v. Solomon, 60 A.D.2d 798 (1st Dept.1977)	4
Rock v. Coombe, 694 F.2d 908 (2d Cir. 1982) cert. denied, 103 S. Ct. 1773 (1983)	6
United States v. Wight, 176 F.2d 908 (2d Cir. 1982) cert. denied, 338 U.S. 950 (1950)	8
United States v. Williams, 575 F.2d 388 (2d Cir.) cert. denied, 439 U.S. 842 (1978)	10

Other Authority

New York Penal Law § 125.25	3
New York Criminal Procedure Law § 440.10	5, 7

STATEMENT OF THE CASE

The Trial

Petitioner and co-defendant Joseph Miller were indicted for Murder in the Second Degree (New York Penal Law § 125.25) and a related weapons charge arising out of the shooting death of Norman Duncan on June 18, 1974.

Petitioner's co-defendant, Joseph Miller, earned his living as an illicit drug dealer in The Bronx, New York. Amongst his employees were petitioner, who worked as Miller's "body guard", Donald Isom and Norman Duncan, who acted as "look-outs", and George McFadden, who was involved in the sale of the narcotics. Some time approximately four to five months before the murder, Donald Isom and Norman Duncan toyed with the idea of "ripping off" Miller. While they had talked about the possibilities, their idea did not ripen into a full-fledged plan until one week before the murder, when Miller began paying Duncan and Isom less money.

At approximately 6:00 p.m. in the late afternoon of June 18, 1974, co-defendant Joseph Miller was standing with a group of people on Hoe Avenue in the vicinity of 173rd Street in Bronx County. Petitioner rode up to the block on a bike and Miller separated himself from the crowd, approached petitioner, and handed him a gun. Petitioner placed the gun in his pants and sat down in a beach chair on Hoe Avenue. Soon after, Duncan and Isom arrived on Hoe Avenue and walked past petitioner, who was still seated in the beach chair on the east side of the block. About 50 feet up the street from petitioner, Duncan and Isom encountered George McFadden, who was sitting on the stoop of a building. Duncan placed his arm around McFadden's neck, and a "minor scuffle" ensued.

Within seconds, petitioner dropped down on one knee and began firing at Duncan at a point blank range of about 50 feet. Isom ran towards 172nd Street, and Duncan ran in the opposite direction. Petitioner, now standing, crossed the street and continued to fire at Duncan from a position in front and to the left of Duncan.

During the shooting, co-defendant Miller urged petitioner to keep shooting. Soon, co-defendant Miller shouted to petitioner, "Let's get the hell out of here." Gun in hand, petitioner fled the scene with co-defendant Miller.

About one week later, co-defendant Miller told Isom that his (Miller's) man, Solomon, could have killed him, too, and that Isom should take care of his brother.

Vincent Garrett, a private investigator, testified in petitioner's behalf at trial. He referred to a transcript of an alleged telephone conversation with Donald Isom, whom he had never seen or spoken to in person. On direct examination Garrett asserted that Isom said that he did not know who shot Duncan but was told it was Solomon, and that he did not see Miller the day of the murder. On cross-examination, the witness admitted that Isom did, in fact, identify "Nate" (Solomon) as the man who shot Duncan.

The jury found both petitioner and co-defendant Joseph Miller guilty of Murder in the Second Degree. Petitioner was sentenced to 25 years to life imprisonment.

The State Court Appeals

Petitioner appealed his conviction to the Appellate Division of the State of New York, First Department, alleging, inter alia, that his Sixth Amendment right to confront his accusors was violated by the admission of co-defendant Miller's extra-judicial statement and that his guilt was not proven beyond a reasonable doubt at trial. The People responded by arguing that petitioner had failed to properly preserve a question of law concerning his co-defendant's statement by his failure to make a contemporaneous objection to the statement at trial, and that this claim, as well as the others raised, were, in any event, without merit. The Appellate Division, First Department, unanimously affirmed petitioner's conviction, without opinion. People v. Solomon, 60 A.D.2d 798 (1st Dept. 1977). Leave to appeal to the New York Court of Appeals was denied by then Associate Judge (now Chief Judge) Lawrence H. Cooke. People v. Solomon, 43 N.Y.2d 932 (1978).

The Collateral State Proceedings

On April 18, 1979, petitioner filed a post-conviction motion to vacate his conviction motion in Supreme Court, Bronx County pursuant to New York Criminal Procedure Law § 440.10. Petitioner attacked his conviction on the ground that he was denied the effective assistance of counsel at trial. Specifically, petitioner alleged that his attorney (1) failed to investigate his case, (2) failed to file any motions on his behalf, (3) failed to object to hearsay evidence introduced at trial, (4) failed to move for a severance, and (5) failed to object to the court's allegedly erroneous charge to the jury.

On May 15, 1979, Justice Donald Zimmerman, who presided at petitioner's trial, denied his motion on the merits. Permission to appeal to the Appellate Division, First Department, was denied on August 16, 1979, by Associate Judge David Ross.

The Federal Court Proceedings

On July 29, 1980, petitioner filed a petition for a writ of habeas corpus in the United States District Court for the Southern District of New York claiming that: 1) the admission of his co-defendant's statement violated his Sixth and Fourteenth Amendment rights, 2) his guilt was not proven beyond a reasonable doubt, 3) the court's charge to the jury was erroneous, 4) the court erroneously admitted evidence of petitioner's drug-related activity, 5) his sentence was excessive, and 6) he was denied the effective assistance of counsel at trial. Petitioner had raised his first five claims in his brief to the Appellate Division and the sixth in his 440.10 motion.

On May 6, 1981, Judge Charles L. Brieant denied the writ in all respects. Judge Brieant found that, except for his inadequacy of counsel claim, petitioner had exhausted his state court remedies with respect to the issues raised in his petition, but that his claims were without merit.

On June 19, 1981, pursuant to a motion filed by petitioner, Judge Brieant issued a Corrective Memorandum and Order finding that petitioner had, in fact, exhausted his ineffective assistance of counsel claim in state court.

Judge Brieant then reviewed petitioner's claim and denied his claims of error on the merits.(See Respondent's Appendix 1).

On June 2, 1981, Judge Brieant denied petitioner a Certificate of Probable Cause to appeal to the Second Circuit. A Certificate was subsequently granted by that Court.

On December 1, 1982, in accordance with Rock V. Coombe, 694 F.2d 908 (2d Cir. 1982) cert. denied, 103 S. Ct. 1773 (1983), petitioner abandoned his claims of erroneous jury instructions, improperly admitted evidence, and the alleged excessiveness of sentence on his appeal before the Second Circuit.

In appealing the denial of his petition for a writ of habeas corpus to the United States Court of Appeals for the Second Circuit, petitioner again claimed that 1) he was denied the effective assistance of counsel at trial, 2) that his guilt had not been proven beyond a reasonable doubt, and 3) that a statement of his co-defendant admitted at trial violated the rule of Bruton v. United States, 391 U.S. 123 (1968).

In affirming the judgment of the District Court, the Second Circuit found that petitioner was not denied his Sixth and Fourteenth Amendment rights to the effective assistance of counsel. Specifically, the court found that some investigative work was done by a court-appointed private investigator and that petitioner's claim that further investigation would have benefited him was entirely speculative. Furthermore, the court found that trial counsel's failure to object to a hearsay statement of co-defendant Miller admitted at trial as a violation of the rule of Bruton v. United States, 391 U.S. 123 (1968), was a reasonable tactical judgment (see Petitioner's Appendix A, pp. 4-6).

REASONS FOR DENYING THE WRIT

POINT

A WRIT OF CERTIORARI SHOULD NOT ISSUE TO REVIEW THE CONSTITUTIONAL PROPRIETY OF THE SECOND CIRCUIT'S "FARCE AND MOCKERY" STANDARD IN EXAMINING THE EFFECTIVE ASSISTANCE OF DEFENSE COUNSEL IN A STATE CRIMINAL TRIAL UNDER THE 6TH AND 14TH AMENDMENTS IN THE INSTANT CASE SINCE BOTH A NEW YORK STATE COURT AND THE FEDERAL DISTRICT COURT FOUND THAT PETITIONER WAS AFFORDED THE EFFECTIVE ASSISTANCE OF COUNSEL USING HIGHER STANDARDS AND WHERE, GIVEN THE FACTS OF THE INSTANT CASE, PETITIONER RECEIVED THE EFFECTIVE ASSISTANCE OF COUNSEL UNDER ANY OF THE PREVAILING STANDARDS ADOPTED BY THE CIRCUIT COURTS.

Petitioner claims that his petition for a writ of certiorari should be granted in order to raise before this Court the issue of "whether the appropriate standard under the Sixth Amendment for judging the adequacy of an accused's trial counsel's representation should be the 'farce and mockery' standard of the Second Circuit or the reasonable competence standards adopted by all the other Federal Circuit Courts of Appeals." (Petition p. 7). Petitioner's claim should not be entertained and his petition should be denied since it is clear that, in the instant case, petitioner received the effective assistance of counsel at trial under any of the prevailing standards in the Federal Circuit Courts and thus, this is not an appropriate case for this Court's review of this issue.

Indeed, in reviewing petitioner's claim, both the New York court that decided petitioner's post-conviction motion pursuant to New York Criminal Procedure Law § 440.10 and the District Court for the Southern District of New York applied more exacting standards than the Second Circuit's "farce and mockery" standard and found petitioner's counsel's representation not to

be lacking.*

Furthermore, a review of trial counsel's representation in the instant case reveals that this petition does not present a factual basis on which petitioner's claim should be entertained. Petitioner devotes much of his argument to his complaint that trial counsel did not visit him at his place of incarceration, and failed to adequately investigate and prepare his case. In support of his contention, petitioner cites the vouchers counsel submitted for reimbursement, relating to petitioner's case. Surely, this Court must recognize that these vouchers do not impart the complete picture. To begin with, they do not relate the discussions and conferences petitioner undoubtedly had with counsel on the many adjournment dates he was produced in court, under conditions far better than those that would have been afforded at Riker's Island, the New York City jail in which petitioner was confined pending trial. Secondly, they do not contain preparatory work done by counsel for which he did not submit a claim and thirdly, they do not contain the preparation and investigation conducted by counsel for co-defendant Miller which was undoubtedly used to their mutual benefit before and during trial. Indicative of the probability that petitioner and trial counsel did have numerous discussions concerning the case is the fact that petitioner at no time expressed dissatisfaction with counsel at trial. Furthermore, infrequency of visitation and allegations of insufficient time consumed in oral discussion and legal research are not the crucial tests of the effectiveness of counsel. Brinkley v. LeFevre, 621 F.2d 45, 46 (2d Cir. 1980); United States v. Wight, 176 F.2d 376 (2d Cir. 1949) cert. denied, 338 U.S. 950 (1950. Such proof of inadequacy lies in the "character of the resultant proceedings" Wight, supra at 379.

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* New York State follows a more exacting "meaningful representation" standard in testing the effectiveness of counsel. People v. Baldi, 54 N.Y.2d 137 (1981); People v. Bell, 48 N.Y.2d 933 (1979); People v. Aiken, 45 N.Y.2d 394 (1978).

The District Court, in its corrective order, specifically found that petitioner's trial counsel "participated actively and diligently in the trial" and provided effective assistance "even under the standard of 'reasonable assistance or reasonable competence' ". (See Respondent's Appendix 1, p. 4).

Petitioner's additional claims are weaker still. Petitioner's Bruton claim was so tenuous that trial counsel's lack of objection was most probably the best tack to take in order to insure that the statement was not given undue significance. In the statement at issue, co-defendant Miller merely claimed that petitioner was "his man." In fact, Miller's declaration was admitted in order to tie Miller to the crime under the acting-in-concert theory. The direct evidence clearly established that Solomon murdered Duncan. Direct evidence and uncontradicted circumstantial proof also demonstrated that Solomon was Miller's bodyguard. Thus, Miller's recognition of his own complicity added nothing vis-a-vis Solomon. At best it was cumulative evidence on the issue of the identity of the man who took part in the shooting. Furthermore, petitioner's claim that counsel should have moved for a severance because of the probable admission of this statement at trial fails for the same reason - the insignificance of the statement - and for the additional reason that in light of the overwhelming independent proof of his guilt, a severance would have had virtually no impact on petitioner's case and thus, would have been far outweighed by the state's interest in judicial economy.

Finally, the bulk of petitioner's other complaints refer to counsel's lack of objection to evidence admitted at trial. It should suffice to note that the propriety of admitting this evidence was raised by petitioner in the Appellate Division of the State of New York, First Department. That court could have reversed his conviction, despite his lack of objection, in the interest of justice, had such egregious errors been committed that petitioner was unduly prejudiced at trial. Instead, the state court found that petitioner was not denied a fair trial. This Court should agree.

Nor can there be any question that defense counsel below prepared a well thought out, complete and effective defense. A defense witness was presented, and defense counsel vigorously cross-examined all of the People's witnesses as well as co-defendant's witnesses. Moreover, defense counsel interposed objections at appropriate times, moved for a trial order of dismissal and prepared a forceful summation. Furthermore, any legitimate avenues of attack not touched upon by petitioner's counsel were certainly

covered by co-counsel, whose presentation this Court can consider in determining the adequacy of petitioner's representation. United States v. Williams, 575 F.2d 388, 393 (2d Cir.) cert. denied, 439 U.S. 842 (1978). Consequently, it is clear that whether judged by the standards of the Second Circuit or by some higher standard, petitioner was afforded the effective assistance of counsel, and thus that this record is an inappropriate vehicle for considering the issue petitioner wishes to present.

CONCLUSION

THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE DENIED IN ALL RESPECTS.

Respectfully submitted,

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District Attorney
Bronx County
Attorney for Respondent

PETER D. CODDINGTON
ROBIN R. DOLSKY
Assistant District Attorneys
Of Counsel

OCTOBER, 1983

ar

APPENDIX

ORIGINAL

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- -X

NATHAN SOLOMON, :

Petitioner, :

-against- :

DAVID HARRIS, Warden of Green Haven Correctional Facility and ROBERT ABRAMS, Attorney General of the State of New York, :

Respondents. :

- -X

Pro Se 80 Civ. 4321-CLB

MEMORANDUM AND ORDER

Brieant, J.

On May 6, 1981 this Court issued a Memorandum and Order denying the application of petitioner Nathan Solomon for a writ of habeas corpus. On June 10, 1981 petitioner filed a motion for relief from this Order, pursuant to Rules 60(b)(1)(6) and 61, F.R.Civ.P., and the Rules Governing Section 2254 Cases in the United States District Courts.

Petitioner asserts the following grounds for his motion: (1) petitioner's copy of the Memorandum and Order of May 6, 1981 was not signed, but rubber-stamped; (2) the Court mistakenly held that petitioner had failed to exhaust his state remedies as to his claim based on ineffectiveness of counsel, and therefore failed to reach the merits of this claim; (3) omissions, mistakes and errors by the Court have deprived the petitioner of Constitutional and statutory rights; and (4) a prompt hearing on petitioner's Sixth Amendment claim is required.

MICROFILM
JUN 23 1981

Upon reading petitioner's motion herein, his petition for a writ of habeas corpus, and the affidavit in opposition to the petition, the Court concludes that the petitioner did in fact exhaust his state remedies as to his claim for ineffective assistance of counsel, as required by 28 U.S.C. § 2254(b), prior to filing his petition for a writ of habeas corpus on July 29, 1980. Apparently, petitioner filed a motion in state court, pursuant to § 440.10, New York Criminal Procedure Law, in which he raised the ground of ineffective assistance of counsel; his motion was denied in May 1979 by the Supreme Court, Bronx County, and leave to appeal to the Appellate Division, First Department was denied on August 16, 1979.

Accordingly, petitioner's motion for relief from this Court's May 6, 1981 Order is granted, pursuant to Rule 60(b)(1), on the ground of mistake, for the limited purpose of allowing this Court to rule on petitioner's claim that he received ineffective assistance of counsel during his trial in state court.

The Court declines to order an evidentiary hearing as to this claim; the Court has read the record of petitioner's trial in state court, which documents the conduct of petitioner's counsel during trial.

Petitioner asserts that his trial counsel was ineffective for the following reasons: (1) trial counsel failed to make an adequate investigation of the facts and the law; (2) trial counsel failed to file necessary motions and applications; (3) trial counsel failed to object to hearsay evidence; (4) trial counsel failed to make a motion that petitioner's trial be severed from that of his co-defendant; (5) trial counsel failed to make a motion to suppress

the testimony of Mr. Harold Simpson; and (4) trial counsel failed to object to the trial judge's charge of the jury.

In this Circuit, the standard for judging assistance of counsel is still that set out in United States v. Wight, 176 F.2d 376, 379 (1949), cert. denied 338 U.S. 950 (1950):

> "Unless the purported representation of counsel was such as to make the trial a farce and a mockery of justice, mere allegations of incompetency or inefficiency of counsel will not ordinarily suffice as grounds for the issuance of a writ of habeas corpus ....
>
> A lack of effective assistance of counsel must be of such a kind as to shock the conscience of the Court and make the proceedings a farce and mockery of justice."

See, United States v. Aulet, 618 F.2d 182, 187 (2d Cir. 1980); Indiviglio v. United States, 612 F.2d 624, 629, n. 8 (2d Cir. 1979), cert. denied, 445 U.S. 933 (1980); United States v. Bubar, 567 F.2d 192, 202 (2d Cir.), cert. denied, 434 U.S. 872 (1977).

The Court of Appeals has also declined recently to reconsider the Wight standard in light of the standards followed in other Circuits of "reasonable assistance" or "reasonable competence," because the Court was not presented with a proper case in which to so reconsider. See, 618 F.2d at 187; 612 F.2d at 629, n. 8; Rickenbacher v. Warden, Auburn Correctional Facility, 550 F.2d 62, 66 (2d Cir. 1976), cert. denied, 434 U.S. 826 (1977). This is certainly not such a case.

In evaluating a claim of ineffective assistance of counsel, a Court

must begin by examining the strength of the prosecution's case. 618 F.2d at 188; 612 F.2d at 629, n. 9. As this Court noted in its Order of May 6, 1981:

> "We feel constrained to observe that this case arose out of a slaying by gunfire of one member of a drug conspiracy by another on a city street in broad daylight in the presence of at least three eye-witnesses. Clarence Darrow reincarnate could not have exonerated this petitioner of his overwhelming guilt."

The Court also finds that the trial counsel participated actively and diligently in the trial, although he apparently did not object as frequently as petitioner would have wished. Accordingly, the Court holds that the petitioner's trial counsel provided effective assistance under the Wight standard, and even under the standard of "reasonable assistance or reasonable competence," not applicable here.

The Court denies petitioner's motion for relief from judgment on the other grounds asserted. The original Memorandum and Order of May 6, 1981, which has been docketed and filed in this Court, was manually signed by me, while all copies were rubber-stamped in accordance with the Court's normal practice. Petitioner's contention that the Court's Order contains omissions, mistakes and errors, other than as to the Sixth Amendment claim, is premised on arguments previously considered and rejected by the Court; the Court declines to reconsider these contentions.

So Ordered.

Dated: New York, New York
June 19, 1981

Charles L. Brieant

Charles L. Brieant
U. S. D. J.

Office - Supreme Court, U.S.
FILED
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ALEXANDER L. STEVAS,
CLERK

No. 83-5500

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

NATHAN SOLOMON,

Petitioner,

v.

DAVID HARRIS, Warden of Green Haven Correctional Facility and ROBERT ABRAMS Attorney General of the State of New York

Respondents.

PETITIONER'S REPLY BRIEF

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No. 83-5500

IN THE

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PETITIONER'S REPLY BRIEF

Petitioner submits this reply brief in response to respondents' Brief in Opposition.

There has been no evidentiary hearing in this case. Yet, using speculative "facts" undetermined by any court, respondents argue that petitioner should be denied a hearing on his claims. On page 8 of their brief, respondents state that petitioner "undoubtedly had discussions and conferences with his attorney" (emphasis added) on adjournment dates; assert incredibly that preparatory

work probably was done by appointed counsel for which reimbursement was not sought; and state that petitioner "undoubtedly" used co-defendant's attorney's preparatory work (there is no proof whether any such work was done) "to their mutual benefit." These assertions have no basis in the record. However, by citing these assumptions, respondents concede their materiality. Because these crucial, material issues of fact are disputed and remain judicially undetermined, dismissal of the petition is precluded. The "missing facts" upon which respondents base their opposition should be determined at a hearing rather than being assumed as true by respondents' ipse dixit. Because of respondents' concessions, summary reversal of the judgment of the Court of Appeals and a remand to the District Court for a hearing is warranted.

CONCLUSION

For the foregoing reasons, the Court should grant the petition for certiorari, or alternatively should summarily reverse and remand for a hearing.

Respectfully submitted,

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November 1, 1983

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PETITIONER'S SUPPLEMENTAL BRIEF

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No. 83-5500

IN THE

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NATHAN SOLOMON,

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v.

DAVID HARRIS, Warden of Green Haven Correctional Facility and ROBERT ABRAMS Attorney General of the State of New York,

Respondents.

PETITIONER'S SUPPLEMENTAL BRIEF

Petitioner submits this Supplemental Brief to inform the Court of a recent change in the caselaw of the Second Circuit. In Trapnell v. United States, Doc. No. 83-2025 (December 19, 1983) (opinion annexed hereto), the Circuit Court adopted a standard of "reasonably competent assistance" for ineffective assistance of counsel claims under the Sixth Amendment. In a unanimous opinion written by Chief Judge Feinberg, the Circuit Court overruled United States v. Wight, 176 F.2d 376 (2d Cir. 1949,

cert. denied, 338 U.S. 950 (1950). Wight had demanded that a criminal attorney's ineffectiveness be so poor as to "make the proceedings a farce and mockery of justice." 176 F.2d at 397. In the instant case, however, the Second Circuit judged petitioner's claim of ineffectiveness of counsel solely under the old "farce and mockery" standard, and not under the Circuit's new and more stringent "reasonable competence" standard. Judge Oakes, in his concurrence, stated that he felt "bound by the present law of the Circuit." Petitioner therefore respectfully requests that this case be remanded to the Second Circuit for reconsideration under Trapnell.

Conclusion

For the foregoing reasons, the Court should grant the petition for certiorari and summarily remand this case to the Second Circuit for its reconsideration under the Circuit's newly adopted standard of "reasonably competent assistance" of counsel.

Respectfully submitted,

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Dated: December 29, 1983
New York, New York

UNITED STATES COURT OF APPEALS

For the Second Circuit

No. 66 August Term 1983

Argued September 14, 1983 Decided December 19, 1983

Docket No. 83-2025

----------X

GARRETT BROCK TRAPNELL,

Plaintiff-Appellant,

- against -

UNITED STATES OF AMERICA,

Defendant-Appellee.

----------X

RECEIVED SDNY DEC 19 1983 U.S. COURT OF APPEALS SECOND CIR.

Before: FEINBERG, Chief Judge, LUMBARD and NEWMAN, Circuit Judges.

Appeal from district court judgment denying appellant's petition to vacate his conviction due to ineffective assistance of counsel.

Affirmed.

L. KEVIN SHERIDAN, Brooklyn, NY, Assistant United States Attorney for the Eastern District of New York (Raymond J. Dearie, United States Attorney for the Eastern District of New York, of Counsel), for Defendant-Appellee.

WILLIAM C. PELSTER, New York, NY (Robert L. Hubbard, of Counsel), for Plaintiff-Appellant.

FEINBERG, Chief Judge:

Garrett Brock Trapnell appeals from an order of the United States District Court for the Eastern District of New York, Jacob Mishler, J., denying Trapnell's petition under 28 U.S.C. § 2255 to vacate his 10-year old conviction. Appellant argues that the assistance of counsel that he received at the trial was ineffective. Judging counsel's performance by the "reasonably competent assistance" standard, which we adopt in this opinion, we affirm the judgment of the district court.

I.

Appellant Trapnell was found guilty in May 1973 after a jury trial before then Chief Judge Mishler on all three counts of an indictment charging him with aircraft piracy, 49 U.S.C. § 1472(i), interference with an aircraft flight crew, 49 U.S.C. § 1472(j), and possession of a firearm in the commission of a federal crime, 18 U.S.C. § 924(c)(2). All three charges stemmed from Trapnell's hijacking of a TWA airliner on a scheduled flight between Los Angeles and New York, in January 1972. The basic facts relating to the hijacking are set forth in this court's opinion affirming Trapnell's conviction. See United States v. Trapnell, 495 F.2d 22 (2d Cir.), cert. denied, 419 U.S. 851 (1974). We presume general familiarity with that opinion. We note, however, that Trapnell was tried twice: his first trial, before Judge Rosling, resulted in a mistrial because the jury was unable to reach a verdict; his second trial, before

Judge Mishler, resulted in his conviction. In both trials, Trapnell presented an insanity defense.

In this collateral attack on his conviction, Trapnell points out that three witnesses who were not called to testify at the second trial -- Drs. Stanley Portnow, James Cravens and David Hubbard -- had had the most sustained contact with Trapnell immediately after the hijacking and were therefore in the best position to testify about his insanity at the time of the crime. Trapnell argues that the psychiatrists who testified at the second trial did not agree on the question of his insanity, and that if Drs. Portnow, Cravens and Hubbard had testified, the jury would have been likely to find that the government had not proven his sanity beyond a reasonable doubt. In addition, Trapnell argues that his attorney at the second trial relied too heavily on subpoenas to compel testimony, and did not adequately establish the professional qualifications of the expert witnesses. According to appellant, at his second trial he was not accorded his Sixth Amendment right to "effective assistance of counsel." Appellant also urges us to reject the "farce and mockery" standard used by this court to determine whether the assistance of counsel at a criminal trial was "effective," and to adopt instead a standard of "reasonable competence." That issue, as well as the merits of the appeal, was briefed and argued by both parties.

II.

Before examining appellant's specific contentions, we discuss the appropriate standard of competence for a defendant's attorney in a criminal trial. In the Second Circuit, that standard has been governed for over thirty years by the rule laid down in United States v. Wight, 176 F.2d 376, 379 (2d Cir. 1949), cert. denied, 338 U.S. 950 (1950): "A lack of effective assistance of counsel must be of such a kind as to shock the conscience of the court and make the proceedings a farce and mockery of justice." In Wight, this court adopted the standard first formulated by Judge Thurman Arnold for the D.C. Circuit in Diggs v. Welch, 148 F.2d 667, 670 (D.C. Cir.), cert. denied, 325 U.S. 889 (1945). By 1962, nine of the eleven circuits were applying the Diggs "farce and mockery" standard. See In re Ernst, 294 F.2d 556, 558 (3d Cir.), cert. denied, 368 U.S. 917 (1961); Snead v. Smyth, 273 F.2d 838, 842 (4th Cir. 1959); O'Malley v. United States, 285 F.2d 733, 734 (6th Cir. 1961); United States ex rel. Feeley v. Ragen, 166 F.2d 976, 980-81 (7th Cir. 1948); Johnston v. United States, 254 F.2d 239, 240 (8th Cir. 1958); Cofield v. United States, 263 F.2d 686, 689 (9th Cir.), rev'd per curiam on other grounds, 360 U.S. 472 (1959); Frand v. United States, 301 F.2d 102, 103 (10th Cir. 1962). The two remaining circuits adopted the "farce and mockery" standard in 1965 and 1970, respectively. See Williams v. Beto, 354 F.2d 698, 704 (5th Cir. 1965); Bottiglio v. United States, 431 F.2d 930, 931 (1st Cir. 1970) (per curiam).

The resulting uniformity in the standard of competence of counsel was disrupted in 1970, when the Fifth Circuit stated: "We interpret the right to counsel as the right to effective counsel. We interpret counsel to mean not errorless counsel, and not counsel judged ineffective by hindsight, but counsel reasonably likely to render and rendering reasonably effective assistance." Caraway v. Beto, 421 F.2d 636, 637 (5th Cir. 1970) (per curiam) (quoting MacKenna v. Ellis, 280 F.2d 592, 599 (5th Cir. 1960), modified, 289 F.2d 928 (5th Cir.), cert. denied, 368 U.S. 876 (1961)). That same year, the Third Circuit replaced the "farce and mockery" standard with a standard of "normal competency." Moore v. United States, 432 F.2d 730, 737 (3d Cir. 1970) (in banc). Similarly, the D.C. Circuit, apparently the original architect of the "farce and mockery" test, held in 1973 that "a defendant is entitled to the reasonably competent assistance of an attorney acting as his diligent and conscientious advocate." United States v. DeCoster, 487 F.2d 1197, 1202 (D.C. Cir. 1973); see also id. at 1203 ("Counsel should be guided by the American Bar Association Standards for the Defense Function"). Since 1970, every circuit except this one has adopted a "reasonably competent assistance" standard, in one of its many formulations. See United States v. Bosch, 584 F.2d 1113, 1120-21 (1st Cir. 1978) ("reasonably competent assistance"); Marzullo v. Maryland, 561 F.2d 540, 543-44 (4th Cir. 1977), cert. denied, 435 U.S. 1011 (1978) ("normal competency"); Beasley v. United States, 491 F.2d 687, 696 (6th

Cir. 1974) ("reasonably effective assistance"); United States ex rel. Williams v. Twomey, 510 F.2d 634, 641 (7th Cir.), cert. denied, 423 U.S. 876 (1975) ("minimum standard of professional representation"); United States v. Easter, 539 F.2d 663, 666 (8th Cir. 1976) ("customary skills and diligence" of "a reasonably competent attorney"); Cooper v. Fitzharris, 586 F.2d 1325, 1328 (9th Cir. 1978) (in banc), cert. denied, 440 U.S. 974 (1979) ("reasonably competent and effective" assistance); Dyer v. Crisp, 613 F.2d 275, 278 (10th Cir.) (in banc), cert. denied, 445 U.S. 945 (1980) ("reasonably competent assistance"). The Eleventh Circuit, which adopted Fifth Circuit law as precedent in Bonner v. City of Prichard, 661 F.2d 1206, 1207 (11th Cir. 1981) (in banc), recently reaffirmed the Fifth Circuit's "reasonably effective assistance" standard in Douglas v. Wainwright, 714 F.2d 1521, 1553 (11th Cir. 1983).

Similarly, only a few state courts now apply the "farce and mockery" standard. See Note, A Functional Analysis of the Effective Assistance of Counsel, 80 Colum. L. Rev. 1053, 1058 n.41 (1980). In particular, all three states within this circuit have adopted the new standard for assessing the competence of counsel in criminal trials. In People v. Droz, 39 N.Y.2d 457, 463 (1976), the New York Court of Appeals vacated a conviction, stating that "we cannot say that the representation defendant received was adequate or effective in any meaningful sense of the word." This case was later interpreted as abandoning the "farce and mockery" standard that had prevailed in the state. See

People v. Aiken, 45 N.Y.2d 394, 398 (1978). New York now appears to follow a "reasonable competence" standard. See Barnes v. Jones, 665 F.2d 427, 434 (2d Cir. 1981), rev'd on other grounds, 103 S.Ct. 3308 (1983). Vermont adopted a "customary skill and knowledge" standard in 1975. See In re Cronin, 133 Vt. 234, 240 (1975). Connecticut embraced a "reasonable competence" standard in 1976. See State v. Clark, 365 A.2d 1167, 1172 (Conn.), cert. denied, 425 U.S. 962 (1976).

The Second Circuit is now the only circuit court that has wrestled with this problem and not embraced the "reasonably competent assistance" standard for trials in criminal cases. Members of this court, however, have repeatedly expressed their displeasure or concern over continuing reliance on the Wight rule. For example, Judge Oakes recently urged that "the Second Circuit at long last join the rest of the federal judiciary, as well as the leading state courts of last resort, in abandoning the contentless, outmoded farce and mockery rule." Langone v. Smith, 682 F.2d 287, 289 (2d Cir. 1982) (Oakes, J., dissenting from denial of rehearing in banc), cert. denied, 103 S.Ct. 739 (1983); see also Rickenbacker v. Warden, 550 F.2d 62, 67-68 (2d Cir. 1976) (Oakes, J., dissenting), cert. denied, 434 U.S. 826 (1977). Similarly, Judge Mansfield has called for a re-evaluation of the "farce and mockery" standard. Indiviglio v. United States, 612 F.2d 624, 632 (2d Cir. 1979) (Mansfield, J., concurring), cert. denied, 445 U.S. 933 (1980); Bellavia v. Fogg 613 F.2d 369, 375-76 n.1 (2d Cir. 1979) (Mansfield, J.,

concurring and dissenting). And, referring to this standard, Judge Kaufman warned against "fall[ing] prey to the pitfalls of rigid adherence to phrases and formulas which seem to gain strength by ritualistic repetition in haec verba in case after case." United States ex rel. Marcelin v. Mancusi, 462 F.2d 36, 46 (2d Cir. 1972) (Kaufman, J., dissenting), cert. denied, 410 U.S. 917 (1973).

In addition, members of the Supreme Court have expressed their displeasure with the resulting conflict among the circuits. In 1978, when a few circuits still subscribed to the "farce and mockery" standard, Justice White argued that the Court "should attempt to eliminate disparities in the minimum quality of representation required to be provided to indigent defendants." Maryland v. Marzullo, 435 U.S. 1011, 1012-13 (1978) (White, J., joined by Rehnquist, J., dissenting from denial of certiorari). Last year, Justice White stated that while it was possible that a trial attorney's failure to offer exculpatory testimony given at a suppression hearing and his failure to call favorable witnesses may have "satisfied the more exacting standard the [Second Circuit] has rejected... there was no holding to that effect, and that question should be answered by the [Second Circuit] after the level of minimum competence required by the Sixth Amendment is determined by this Court." Romero v. United States, 103 S.Ct. 236, 237 (1982) (White, J., dissenting from denial of certiorari).

But although this court has not explicitly abandoned the "farce and mockery" for the "reasonably competent assistance" standard, it has justified its failure to reconsider the standard by pointing out that the result in the cases before it would have been the same under either formulation. See United States v. Daniels, 558 F.2d 122, 126 (2d Cir. 1977); Rickenbacker v. Warden, supra, 550 F.2d at 66; cf. Indiviglio v. United States, supra, 612 F.2d at 632 (Mansfield, J., concurring). For example, in Rickenbacker, Judge Smith, the author of the Wight opinion, stated that "[i]t may be that this court should reconsider the standard set forth in Wight." He added, however, that "we need not decide this issue now, for we conclude that the performance of Rickenbacker's counsel does not fail to meet any of the suggested standards, all of which involve the heavy burden of establishing incompetence." 550 F.2d at 66.

As we show below, in this case too the assistance that defendant received would be deemed "effective" under either standard. But we think that the time has come to declare that "effective" assistance means "reasonably competent assistance," which we regard as a shorthand for the standard that the quality of a defense counsel's representation should be within the range of competence reasonably expected of attorneys in criminal cases. See United States v. Bosch, supra, 584 F.2d at 1121; Marzullo v. Maryland, supra, 561 F.2d at 543-45. It would have been ideal, of course, to adopt the "reasonably competent assistance" standard in a case in which the defense counsel's representation

fell below that benchmark but nonetheless did not make the trial a "farce and mockery." Undoubtedly, such a case would best elucidate the different nuances of the two standards. But given the manner in which our court has applied the "farce and mockery" standard in recent years, we are unsure that such a case will ever be before us.

First, we have repeatedly applied both standards in recent years and never found that the result of a case hinged on the choice of a particular standard. See United States v. Taylor, 562 F.2d 1345, 1360 (2d Cir.), cert. denied, 432 U.S. 909 and 434 U.S. 853 (1977); United States v. Medico, 557 F.2d 309, 318 & n.15 (2d Cir.), cert. denied, 434 U.S. 986 (1977); United States v. Daniels, supra, 558 F.2d at 126. Indeed, during the last three years, we have applied both standards in every ineffective assistance of counsel case decided by published opinion. And in every case, we found that the result would be the same under either standard. United States v. Maniego, 710 F.2d 24, 26-27 (2d Cir. 1983) (per curiam); United States v. Helgesen, 669 F.2d 69, 71 (2d Cir.), cert. denied, 456 U.S. 929 (1982); United States v. Alessi, 638 F.2d 466, 477 (2d Cir. 1980); United States v. Aulet, 618 F.2d 182, 187 (2d Cir. 1980).

Second, we note that in applying the "farce and mockery" standard, this court has in recent years often used language normally associated with the inquiry employed in the "reasonably competent assistance" test. For example, in Ennis v. LeFevre, 560 F.2d 1072, 1076 (2d Cir. 1977), cert. denied, 435

U.S. 976 (1978), Judge Meskill pointed out that if defendant's counsel failed to press an argument that had obvious merit, act as an advocate, obtain an adequate record or perform a conscientious investigation, the defendant could prevail on an ineffective assistance claim. This enumeration of different elements of a claim of ineffective assistance, together with the listing of objective criteria (e.g., failure to press an argument) is typical of "reasonably competent assistance" standards. See United States v. DeCoster, supra, 487 F.2d at 1203-04. Similarly, in Saltys v. Adams, 465 F.2d 1023, 1028 (2d Cir. 1972), Judge Oakes, joined by Judge Smith, held that the assistance of counsel had been inadequate because the attorney had not explored, at a suppression hearing in the absence of the jury, the evidence underlying the proposed in-court identification procedure. In support of this conclusion, Judge Oakes noted that this procedure had been described as "proper" by the Connecticut Supreme Court. The inquiry in that case does not appear to be very different from that required to determine whether the assistance was "reasonably competent," that is, whether the attorney took advantage of techniques deemed "proper" for criminal defenses.

Third, other circuits have found that as the "farce and mockery" test evolved through the decades, it became little more than a shorthand description of an objective inquiry into "reasonable competence." For example, in moving from one standard to the other, the Ninth Circuit stated that "[t]he

reformulation more accurately describes the law as it has actually been applied, in this circuit and in others, for many years." Cooper v. Fitzharris, supra, 586 F.2d at 1330. Similarly, in adopting a new standard for the competency of counsel, the Eighth Circuit stated:

> As we perceive the standard established in our prior decisions it is that trial counsel fails to render effective assistance when he does not exercise the customary skills and diligence that a reasonably competent attorney would perform under similar circumstances. When he fails in the performance of this duty the proceedings may be said to have been reduced to a "farce" and "mockery of justice."

United States v. Easter, supra, 539 F.2d at 666 (citations omitted).

Although the difference between the two standards, as they are now applied in this circuit, may be in large part a matter of semantics, there are nonetheless substantial reasons that call for the explicit adoption of a standard of "reasonable competence." First, such a new standard would be consistent with the Sixth Amendment jurisprudence developed by the Supreme Court in the wake of Gideon v. Wainwright, 372 U.S. 335 (1963). The "farce and mockery" standard, first formulated eighteen years before Gideon, was based on the due process clause of the Fifth Amendment. Diggs v. Welch, supra, 148 F.2d at 668-69, had viewed the Sixth Amendment somewhat narrowly to be concerned only with assuring the presence of counsel, leaving the performance of counsel to be tested against the more general "fair trial" standard of the Fifth Amendment's due process clause. More recently, however, the Sixth Amendment has become the source not

holding in Tollett and the dictum in Isaac clearly suggest that this standard is consistent with, and may in fact be required by, the Court's interpretation of the Sixth Amendment.

A second reason for adopting a "reasonably competent assistance" formulation of the standard for competency of counsel in a criminal trial is that this standard complements current efforts to improve the quality of representation in federal courts. Regardless of the way the standards have been applied by us in recent years, "reasonably competent assistance" has traditionally been perceived as a stricter constraint than "farce and mockery." Thus, the adoption of the former standard would underscore this court's concern with the quality of representation. In contrast, if we were to continue to reaffirm the "farce and mockery" standard, our action could be perceived as undermining this circuit's salutory policy of attempting to raise the standards of advocacy in general and of criminal advocacy in particular. See Second Circuit Report--1979, at 20-21. Also, given the pilot program on Admission of Attorneys to Federal Practice, implemented by the Judicial Conference of the United States, which requires that attorneys meet certain special requirements before being deemed qualified to practice before the federal courts, see, e.g., Annual Report of the Director of the Administrative Office of the U.S. Courts--1979, at 103-05, it would be ironic if the Second Circuit reaffirmed a standard that appeared to be less demanding than that adopted by all of the state courts within its geographic jurisdiction.

For these reasons, we believe that the time has come for us explicitly to adopt the "reasonably competent assistance" standard for criminal trials in this circuit. We do so now, and we note that this opinion has been circulated to all active members of the court, none of whom has requested a rehearing in banc.

III.

Applying the standard of reasonable competence, we find that the assistance Trapnell received was not inadequate.[1/] We have repeatedly noted our reluctance to second-guess matters of trial strategy simply because the chosen strategy was not successful. See, e.g., United States v. Helgesen, supra, 669 F.2d at 72; United States v. Aulet, supra, 618 F.2d at 189. We find that all of the complaints against counsel concern matters of trial strategy and thus do not form the basis for a finding of ineffective assistance.

Appellant complains primarily that counsel at his second trial failed to call Drs. Portnow, Hubbard and Cravens, even though the latter two had testified for the defense in the first trial. But at the second trial, Trapnell's attorney did present three expert witnesses, who testified about Trapnell's mental state: Drs. Augustus Kinzel, Jochanan Wiesenfreund and Gurstin Goldin. All three were psychiatrists and held teaching positions: Drs. Kinzel and Goldin at Columbia University, and Dr. Wiesenfreund at New York University. All three presented

testimony that was favorable to Trapnell's insanity defense. Dr. Kinzel stated that Trapnell "was sufficiently impaired by mental illness not to be aware of what he was doing, the nature of what he was doing and certainly not to be able to control what he was doing." Dr. Wiesenfreund testified that Trapnell's conduct on the day of the hijacking was impaired by a mental disease or defect. Similarly, Dr. Goldin stated:

> My opinion is that at the time of the offense with which he has been charged his cognative [sic] and volitional capacities were impaired as a result of a psychological decompensatory process and that he was not able at the time, as a result of mental disease, to appreciate the wrongfulnesss of his behavior or to conform his behavior to the requires [sic] of the law.

We find that even conceding appellant's contention that Drs. Portnow, Cravens and Hubbard had had the most sustained contact with Trapnell immediately after the hijacking, the decision not to call them to testify can easily be justified. Dr. Hubbard's testimony at the first trial was not favorable to Trapnell. He stated that Trapnell "did have substantial capacity to understand the wrongfulness of his act and to have avoided its performance." Dr. Cravens was not allowed to testify on the issue of Trapnell's sanity; Judge Rosling held that he was not qualified to do so. Moreover, the record indicates that the government had contemplated calling Dr. Portnow as a rebuttal witness at the first trial. Trapnell's attorney may in fact have pursued the most promising strategy available: presenting witnesses who had had less contact with Trapnell but who were willing to make a strong statement about his insanity. And while

the insanity defense ultimately did not prevail, that by itself is insufficient reason to find that the assistance was ineffective.

We have considered all of appellant's other arguments in support of his contention that he was denied "effective" assistance of counsel, and we find that they are without merit[2/]. We thus affirm the judgment of the district court.

FOOTNOTES

1/ Trapnell's § 2255 petition and the government's response to that petition are unaccountably missing from the record. Trapnell's present attorney has stated that he has been unable to locate these documents, despite repeated efforts. This court has made independent inquiries, but it has also failed to find the missing papers. We do have, however, Judge Mishler's memorandum decision and order dated January 18, 1982, which makes clear the nature of the issues before him, and we have examined the relevant portions of the transcripts of both trials. We also note that in its brief and at oral argument, the government did not argue that Trapnell was barred from raising these issues at this point. Thus, for the purposes of this appeal, we assume that the issues before us now were properly before Judge Mishler when he denied Trapnell's petition.

2/ Trapnell also argues that Judge Mishler was prejudiced at sentencing by an erroneous statement in the presentence investigation report. In denying the petition, Judge Mishler said that he did not rely on this statement. In this appeal, Trapnell does not explain the basis for his disagreement with Judge Mishler's conclusion, and deals with this argument only in one short footnote in his brief.

GARRETT BROCK TRAPNELL v.
UNITED STATES
83-2025

Nov 24, 1983 I concur JLH

GARRETT BROCK TRAPNELL v.
UNITED STATES
83-2025

I CONCUR.